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Public Prosecutor v Norashikin bt Yusof & Anor

B HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO JA-45A-28–06 OF 2017
COLLIN SEQUERAH J
30 OCTOBER 2018

C *Criminal Law — Dangerous Drugs — Possession — First and second accused charged with two charges under s 12(2) of the Dangerous Drugs Act 1952 punishable under s 12(3) of the Act for in possession of methamphetamine and ketamine — Whether drugs listed as dangerous drugs in First Schedule in the Dangerous Drugs Act 1952 — Whether accused had knowledge of existence of*
D *drugs — Whether accused in possession of drugs — Whether prima facie case proven — Whether there was common intention — Criminal Procedure Code s 180 — Dangerous Drugs Act 1952 s 12(2) & (3) — Penal Code s 34*

E *Criminal Law — Dangerous drugs — Trafficking — First and second accused charged with trafficking in cannabis — Whether drugs listed as dangerous drugs in First Schedule in the Dangerous Drugs Act 1952 — Whether element of possession proven — Whether accused had knowledge of existence of drugs — Whether court*
F *should invoke adverse inference for non-calling of witness — Whether charge of trafficking proven — Whether there was evidence of common intention — Whether prima facie case proven — Criminal Procedure Code s 180 — Dangerous Drugs Act 1952 ss 2, 39B(1)(a) & (2) — Evidence Act 1950 s 114(g) — Penal Code s 34*

G

Evidence — Information leading to fact discovered — Information leading to discovery — Second accused admitted that there were drugs — Second accused led police to place where drugs were recovered and handed them over to police — Whether evidence admissible under s 27 of the Evidence Act 1950 as
H *information leading to discovery — Evidence Act 1950 s 27*

On 3 October 2016, the police had conducted a raid on a house owned by the first accused. During the raid, the second accused had informed SP4 that he kept 'ice' in the kitchen. This led to the discovery of two transparent plastic
I packets containing methamphetamine and three transparent plastic packets containing ketamine inside a plastic packet which was placed inside a cupboard in the kitchen. The court also found cannabis under a refrigerator located in the kitchen. The first accused and the second accused were then charged with three charges namely: (a) trafficking in 972.12g of cannabis ('the first charge'), an

offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act, read together with s 34 of the Penal Code ('the Code'); (b) in possession of 0.27g of methamphetamine ('the second charge'), an offence under s 12(2) of the Act punishable under s 12(3) of the Act, read together with s 34 of the Code; and (c) in possession of 0.37g of ketamine ('the third charge'), an offence under s 12(2) of the Act punishable under s 12(3) of the Act, read together with s 34. Based on the facts, the second accused was a tenant of the house for just one day whereas SP5, who was the younger brother of the first accused had been staying in the house since 19 September 2016. SP5 in his testimony mentioned about the husband of the first accused, Firdaus, who had one set of keys to the house.

Held:

(1) The chemist ('SP3') testified that cannabis were dangerous drugs as defined under s 2 of the Act; and methamphetamine and ketamine were dangerous drugs listed under the First Schedule to the Act. The court did not find that the testimony of SP3 fell into the category of evidence which could be described as inherently incredible. The prosecution had proven both the nature and weight of the dangerous drugs comprising the subject matter of all the charges. Therefore, the prosecution had proven that the drugs were listed as dangerous drugs in the First Schedule in the Act, in respect of all the three charges. In addition, the court also satisfied that there was no fatal break in the chain of exhibits of the case (see paras 17 & 20–23).

(2) The element of exclusivity and the need to exclude others from access to the place where the drugs were found was of paramount importance if the prosecution were to successfully prove custody, control or possession. In the present case, the kitchen area was an open area and anyone who was in the house could access the kitchen area without restriction. The main piece of evidence that Firdaus had unrestricted access to the premises came from SP5. The non-investigation and non-calling of Firdaus had resulted in the prosecution failing to exclude access of the kitchen area of others and had also resulted in a gap in the prosecution case. With these questions being unanswered, the adverse inference under s 114(g) of the Evidence Act 1950 ('the EA') was invoked against the prosecution (see paras 59, 65, 82, 88 & 113–114).

(3) In respect of the first charge, SP4 testified that the reaction of the first and second accused was one of fear when the cannabis was recovered. Such reaction was not consistent with them being possessed with knowledge that the impugned drugs were in the place where it was found. At best, such reaction was neutral and capable of more than one inference. In addition, SP4 testified that: (a) there was no smell of cannabis, unlike most situations where such a similar type of drug was found; (b) the

cannabis was not immediately visible unless one were to bend down, as it was found under the refrigerator; and (c) SP4 did not do any DNA swabbing or fingerprint dusting on the exhibits found. Under all the circumstances, it could not be inferred that the first and second accused had knowledge of the cannabis found under the refrigerator. On totality, the prosecution had failed to prove possession, whether actual or presumed, on the part of both the accused in respect of the first charge. Having failed to prove possession, the charge of trafficking must necessarily failed (see paras 101–103, 105–107 & 115–117).

(4) The evidence disclosed that while the first accused was occupying the premises for several years, the second accused was a tenant for just one day. There was no evidence of a prior meeting of minds between them to traffic in the cannabis nor was there any evidence from which such intention could be inferred. There was therefore no common intention established by the prosecution in respect of the charge of trafficking in cannabis as per the first charge (see paras 120–122).

(5) Upon conducting maximum evaluation of the evidence, the court held that the prosecution had failed to make out a prima facie case against both the accused in respect of the charge of trafficking under s 39B(1)(a) of the Act. Therefore, in accordance with s 180(2) of the Criminal Procedure Code, the court acquitted and discharged the first and second accused on the charge of trafficking without calling upon them to make their defence (see paras 124–125).

(6) In respect to the second and third charges, the second accused in response to the question by SP4, admitted that there were drugs in the kitchen. He also led the police to the place where the drugs were recovered and handed them over to the police. This evidence was admissible under s 27 of the EA as information leading to discovery. The second accused therefore had the requisite knowledge of the existence and whereabouts of the methamphetamine and ketamine and was therefore in actual possession of them. Upon maximum evaluation of the evidence, the prosecution had proven prima facie case against the second accused in respect of the second and third charges and the court had therefore called upon him to enter his defence. The second accused pleaded guilty at that stage to both the second charge and the third charge (see paras 126–127 & 130–132).

(7) Taking into account the public interest in deterring such crimes and considering that the second accused was a first offender, the court sentenced him to three years imprisonment from date of arrest on both the second and third charges and ordered them to run concurrently as they were committed in one transaction (see para 132).

(8) There was no evidence to suggest or infer that the first accused had any knowledge of the incriminating exhibits found in the cupboard nor was there any evidence of prior meeting of minds with the second accused nor circumstances from which such meeting of minds could be inferred pursuant to a common intention under s 34 of the Code. Upon maximum evaluation of the evidence, the court found that the prosecution had failed to make out a prima facie case against the first accused in respect of the second and third charges. The court therefore acquitted and discharged the first accused without calling upon her to make her defence (see paras 133 & 136–137).

[Bahasa Malaysia summary

Pada 3 Oktober 2016, polis telah membuat serbuan ke atas sebuah rumah yang dimiliki oleh tertuduh pertama. Semasa serbuan itu, tertuduh kedua telah memberitahu SP4 bahawa dia menyimpan 'ice' di dapur. Ini membawa penemuan dua bungkusan plastik yang telus mengandungi methamphetamine dan tiga bungkusan plastik yang telus mengandungi ketamine di dalam bungkusan plastik yang diletakkan di dalam almari di dapur itu. Mahkamah juga menemui kanabis di bawah peti ais yang terletak di dapur itu. Tertuduh pertama dan tertuduh kedua kemudian telah dituduh atas tiga pertuduhan, iaitu: (a) mengedar 972.12g kanabis ('pertuduhan pertama'), satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') yang boleh dihukum di bawah s 39B(2) Akta tersebut, dibaca bersama s 34 Kanun Keseksaan ('Kanun tersebut'); (b) memiliki 0.27g methamphetamine ('pertuduhan kedua'), satu kesalahan di bawah s 12(2) Akta tersebut dan boleh dihukum di bawah s 12(3) Akta tersebut, dibaca bersama s 34. Berdasarkan fakta, tertuduh kedua adalah penyewa rumah itu untuk satu hari sahaja manakala SP5, yang merupakan adik lelaki tertuduh pertama telah tinggal di rumah itu sejak 19 September 2016. SP5 dalam keterangannya menyebut tentang suami tertuduh pertama, Firdaus, yang mempunyai satu set kunci rumah tersebut.

Diputuskan:

(1) Ahli kimia ('SP3') telah memberi keterangan bahawa kanabis adalah dadah berbahaya sepertimana ditafsirkan di bawah s 2 Akta tersebut; dan methamphetamine and ketamine adalah dadah berbahaya yang disenaraikan di bawah Jadual Pertama kepada Akta tersebut. Mahkamah tidak mendapati keterangan SP3 terjatuh di bawah kategori keterangan yang boeh digambarkan sebagai memang luar biasa. Pendakwaan telah membuktikan kedua-dua sifat dan berat dadah berbahaya itu merangkumi hal perkara dalam semua pertuduhan. Oleh itu, pendakwaan telah membuktikan bahawa dadah-dadah tersebut adalah disenaraikan sebagai dadah berbahaya dalam Jadual Pertama dalam Akta tersebut, berkaitan dengan ketiga-tiga pertuduhan tersebut. Tambahan

pula, mahkamah juga berpuas hati bahawa rantaian ekshibit-ekshibit dalam kes tidak terputus sehingga memudaratkan (lihat perenggan 17 & 20–23).

(2) Elemen eksklusif dan keperluan untuk mengecualikan yang lain daripada akses ke tempat di mana dadah tersebut ditemui adalah amat penting jika pendakwaan ingin membuktikan dengan jayanya tentang jagaan, kawalan atau milikan. Dalam kes ini, kawasan dapur adalah kawasan terbuka dan sesiapa di dalam rumah tersebut boleh memasuki kawasan dapur itu tanpa sekatan. Keterangan utama bahawa Firdaus mempunyai akses tanpa sekatan kepada premis itu datang daripada SP5. Firdaus yang tidak disiasat dan tidak dipanggil telah mengakibatkan pendakwaan gagal mengecualikan akses kawasan dapur kepada orang lain dan juga mengakibatkan jurang dalam kes pendakwaan. Dengan persoalan yang tidak dijawab ini, inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 ('AK') telah digunakan terhadap pendakwaan (lihat perenggan 59, 65, 82, 88 & 113–114).

(3) Berhubung pertuduhan pertama, SP4 telah memberi keterangan bahawa reaksi tertuduh pertama dan kedua menunjukkan perasaan takut apabila kabanis itu ditemui. Reaksi tersebut tidak konsisten jika mereka mempunyai pengetahuan tentang dadah yang dipersoalkan di tempat ia ditemui. Paling terbaik pun, reaksi tersebut adalah bersifat neutral dan mampu lebih daripada satu inferens. Selain itu, SP4 telah memberi keterangan bahawa: (a) tiada bau kanabis, tidak seperti keadaan biasa di mana jenis dadah yang sama ditemui; (b) kanabis tersebut tidak kelihatan serta-merta kecuali seseorang itu membongkok, kerana ia ditemui di bawah peti ais; dan (c) SP4 tidak melakukan ujian *swabbing* DNA dan dusting cap jari ke atas ekshibit-ekshibit yang ditemui. Dalam apa-apa keadaan, ia tidak dapat disimpulkan bahawa tertuduh pertama dan kedua mempunyai pengetahuan tentang kanabis yang ditemui di bawah peti ais itu. Secara keseluruhan, pendakwaan telah gagal membuktikan milikan, sama ada sebenar atau andaian, di kedua-dua pihak tertuduh berkaitan pertuduhan pertama. Setelah gagal membuktikan milikan, pertuduhan mengenai pengedaran tersebut semestinya gagal (lihat perenggan 101–103, 105–107 & 115–117).

(4) Keterangan menunjukkan bahawa semasa tertuduh pertama menduduki premis tersebut selama beberapa tahun, tertuduh kedua ialah penyewa untuk hanya satu hari. Tiada keterangan tentang penemuan antara mereka sebelum itu yang memikirkan untuk mengedarkan kanabis tersebut dan tiada keterangan lain daripada niat tersebut dapat disimpulkan. Oleh itu, tiada niat bersama telah dibuktikan oleh pendakwaan berhubung pertuduhan mengedar kanabis sepertimana pertuduhan pertama (lihat perenggan 120–122).

(5) Apabila melakukan penilaian keterangan maksimum, mahkamah

memutuskan bahawa pendakwaan telah gagal membuktikan satu kes prima facie terhadap kedua-dua tertuduh berkenaan dengan pertuduhan mengedar di bawah s 39B(1)(a) Akta. Oleh itu, menurut s 180(2) Kanun Tatacara Jenayah, mahkamah membebaskan dan melepaskan tertuduh pertama dan kedua atas tuduhan pengedaran tanpa memanggil mereka untuk membuat pembelaan (lihat perenggan 124–125).

(6) Berhubung pertuduhan-pertuduhan kedua dan ketiga, tertuduh kedua sebagai maklum balas kepada soalan oleh SP4, mengakui bahawa terdapat dadah di dapur. Dia juga membawa polis ke tempat di mana dadah tersebut ditemui dan menyerahkannya kepada polis. Keterangan ini boleh diterima di bawah s 27 AK tersebut sebagai maklumat yang membawa kepada penemuan. Oleh itu, tertuduh kedua mempunyai pengetahuan yang diperlukan tentang kewujudan dan tempat di mana methamphetamine dan ketamine itu dan dengan itu mempunyai milikan sebenar ke atas dadah tersebut. Setelah penilaian maksimum terhadap keterangan itu, pendakwaan telah membuktikan kes prima facie terhadap tertuduh kedua berkenaan pertuduhan-pertuduhan kedua dan ketiga dan oleh itu mahkamah memanggilnya untuk memasukkan pembelaannya. Tertuduh kedua mengaku bersalah di peringkat itu untuk kedua-dua pertuduhan kedua dan ketiga (lihat perenggan 126–127 & 130–132).

(7) Dengan mengambil kira kepentingan awam dalam menghalang jenayah seperti itu dan memandangkan tertuduh kedua merupakan pesalah kali pertama, mahkamah menjatuhkan hukuman tiga tahun penjara dari tarikh tangkap untuk kedua-dua pertuduhan kedua dan ketiga dan mengarahkan pertuduhan-pertuduhan tersebut untuk berjalan serentak kerana ia dilakukan dalam satu transaksi (lihat perenggan 132).

(8) Tiada keterangan untuk mencadangkan atau membuat kesimpulan bahawa tertuduh pertama mempunyai apa-apa pengetahuan tentang ekshibit-ekshibit dipersalahkan yang terdapat di dalam almari dan tiada keterangan tentang pertemuan terdahulu dengan tertuduh kedua untuk memikirkan atau keadaan yang mana pendapat pemikiran sedemikian boleh disimpulkan adalah berikutan satu niat bersama di bawah s 34 Kanun tersebut. Setelah penilaian maksimum keterangan dibuat, mahkamah mendapati bahawa pendakwaan telah gagal membuktikan kes prima facie terhadap tertuduh pertama berkenaan dengan pertuduhan-pertuduhan kedua dan ketiga. Oleh itu, mahkamah telah membebaskan dan melepaskan tertuduh pertama tanpa memanggilnya untuk membuat pembelaannya (lihat perenggan 133 & 136–137).]

Notes

For cases on information leading to discovery, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2427–2431.

For cases on possession, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 313–320.
For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 886–1075.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)
Azizan bin Yahaya v PP [2013] 1 MLJ 180; [2012] 8 CLJ 405, CA (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489, CA (refd)
Husin bin Sitorus v PP [2012] 3 MLJ 782; [2012] 7 CLJ 205, CA (refd)
Law Sie Hoe v PP [2014] 6 MLJ 714; [2014] 1 LNS 269, CA (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 AMR 269, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 AMR 2017, HC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194, FC (refd)
PP v Kalaiselvan [2001] 2 MLJ 157; [2001] 4 AMR 3973, HC (refd)
PP v Md Alim bin Samad [1998] 1 MLJ 260, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)
PP v Mohd Zambri bin Mohd Zelah [2004] MLJU 569; [2005] 2 AMR 23, HC (refd)
PP v Muhamad Nasir b Shaharuddin & Anor [1994] 2 MLJ 576, HC (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37, CA (refd)
Saludin bin Surif v PP [1997] 3 MLJ 317, CA (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
Suresh v State of Uttar Pradesh AIR 2001 SC 1344, SC (refd)
Toh Ah Loh and Mak Thim v Rex [1949] 1 MLJ 54, CA (refd)
Yee Ya Mang v PP [1972] 1 MLJ 120 (refd)

Legislation referred to

Criminal Procedure Code ss 180(1), (2), (3)
Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), 39B(1)(a), First Schedule
Evidence Act 1950 ss 27, 90A, 114(g)
Penal Code s 34

Nor Iffa Zarilla Abd Rahman (Deputy Public Prosecutor, Johor State Legal Advisor's Office) for the appellant.
Nor Shahid bin Abd Malik (Nor Shahid Abd Malik & Assoc) for the first accused.
Hussin bin Othman (Hussin Othman & Co) for the second accused.

Collin Sequerah J:

INTRODUCTION

[1] Both the first and second accused are charged with the following:

First Amended Charge

Bahawa kamu bersama-sama pada 3 Oktober 2016 jam lebih kurang 12.30 pagi, di No 3, Jalan Aliff Harmoni 4/4, Taman Damansara Aliff, dalam daerah Johor Bahru, dalam Negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya jenis Cannabis seberat bersih 972.12 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

Second Amended Charge

Bahawa kamu bersama-sama pada 3 Oktober 2016 jam lebih kurang 12.30 pagi, di No 3, Jalan Aliff Harmoni 4/4, Taman Damansara Aliff, dalam daerah Johor Bahru, dalam Negeri Johor Darul Takzim telah didapati dalam milikan kamu dadah berbahaya jenis Methamphetamine seberat bersih 0.27 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

Third Amended Charge

Bahawa kamu bersama-sama pada 3 Oktober 2016 jam lebih kurang 12.30 pagi, di No 3, Jalan Aliff Harmoni 4/4, Taman Damansara Aliff, dalam daerah Johor Bahru, dalam Negeri Johor Darul Takzim telah didapati dalam milikan kamu dadah berbahaya jenis Ketamine seberat bersih 0.37 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 12(3) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

PROSECUTION CASE

[2] The salient facts of the prosecution case, in summary, reveal that on 3 October 2016 at around 12.15am, SP4 together with six members of a raiding party from the Jabatan Siasatan Jenayah Narkotik, IPK Johor, proceeded to the address at No 3, Jalan Aliff Harmoni 4/4, Taman Damansara Aliff, Johor Bahru ('the said house').

[3] SP4 conducted observation on the said house for around 15 minutes after which a male Malay (later identified as the second accused) and two Malay females (later identified as the first accused and SP6 respectively) exited the house. The first accused opened the gate of the compound using a remote control device.

[4] SP4 then together with the raiding party entered the compound of the house and arrested both the first and second accused, and SP6. SP4 instructed the first accused to open the grill to the front door and the front door using keys (exh P21) which was in the hand of the first accused at the time.

[5] SP4 together with the raiding party, the first and second accused, and SP6 went inside the said house after which SP4 asked them whether they kept anything incriminating to which the second accused replied that he kept 'ice' in the kitchen.

[6] SP4 and the raiding party guided by the second accused went into the kitchen area where the second accused took one transparent plastic packet (exh P18) from a cupboard beside a refrigerator. Inside the plastic packet were found two more transparent plastic packets (exhs P11A(1) and P11A(2)) containing methamphetamine and three transparent plastic packets (exhs P11A(3), P11(4) and P11A(5)) containing ketamine respectively.

[7] SP4 conducted further examination in the kitchen and as a result found under the refrigerator one compressed slab wrapped in silver aluminium foil containing dried plant material suspected to be cannabis (exhs 11B and P11B(1)).

[8] SP4 then conducted an inspection of the upper floor of the house and found the door of the room on the right to be closed and locked. When SP4 knocked the door, a male Malay ('SP5') opened the door. SP4 conducted an examination of the room but did not find anything incriminating.

[9] SP4 also conducted an inspection on a Hyundai motor vehicle registration No JMX J7357 parked in the garage of the house but found nothing incriminating inside.

[10] SP4 then brought all of those arrested namely, both the accused, SP5 and SP6 to the IPD Johor Bahru Utara for further action. SP4 handed over those arrested together with the exhibits seized to the investigating officer ('SP8') together with a search list (exh P19), handover of exhibits form (exh P20), Tampoi police report 12589/16, a remote control with three keys (exh P21), and four mobile phones.

DUTY OF COURT AT THE END OF THE PROSECUTION CASE

[11] The duty of the court at the end of the prosecution case is set out in s 180(1) of the Criminal Procedure Code ('the CPC') which stipulates that when the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.

[12] The cases of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 AMR 2017, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203 respectively lay down the proposition that at the end of the case for the prosecution, their evidence must be subject to maximum evaluation in order to determine whether a prima facie case is made out.

[13] In *Looi Kow Chai v Public Prosecutor*, the Court of Appeal held:

> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. *He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.* (Emphasis added.)

ANALYSIS OF THE PROSECUTION CASE

[14] In order for the prosecution to make out a prima facie case against both the accused in respect of the charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') for trafficking, they must prove the following ingredients:

(a) the drugs are listed as dangerous drugs in the First Schedule in the DDA;

(b) the drugs were in the possession of the accused persons; and;

(c) the accused persons were trafficking in the said dangerous drugs.

[15] In respect of the two other charges for possession of methamphetamine and ketamine respectively under s 12(2) of the DDA, the prosecution must prove possession on the part of the accused persons and that the drugs are listed as dangerous drugs in the First Schedule to the DDA.

The drugs are listed as dangerous drugs in the First Schedule in the DDA

[16] Puan Siti Zubaidah ('SP3'), the chemist, testified that the results of her analysis revealed that the substances analysed were conclusively proved to be 972.12g of cannabis, 0.27g of methamphetamine and 0.37g of ketamine respectively.

[17] SP3 further testified that cannabis is a dangerous drug as defined under s 2 of the DDA. SP3 also confirmed that methamphetamine and ketamine are dangerous drugs and listed under the First Schedule to the DDA.

[18] In the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, the Federal Court held:

> It has been held by the trilogy of the (then) Supreme Court cases of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] CLJ Rep 221; [1987] 1 CLJ 250, *Public Prosecutor v Lam San* [1991] 3 MLJ 426; [1991] 1 CLJ Rep 391; [1991] 3 CLJ 2410 and *Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265; [1994] 2 CLJ 151 *that the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless it is inherently incredible or the defence calls evidence in rebuttal by another expert. The rationale of this view is lucidly explained in Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265; [1994] 2 CLJ 151 where it was held that the evidence of a chemist on dangerous drugs analysed by him is one of fact and not of opinion. *In the circumstances the evidence of a chemist is not controlled by s 51 of the Evidence Act 1950 thereby making it unnecessary for him to testify on the tests conducted by him in arriving at his conclusion. The evidence of the chemist is therefore sufficient*. (Emphasis added.)

[19] See also the case of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489.

[20] I did not on the evidence find that the testimony of SP3 fell into the category of evidence which could be described as inherently incredible.

[21] In any event, SP3 did testify in some detail as to the methods of her analysis in coming to her conclusion. I was therefore satisfied that the prosecution had proven both the nature and weight of the dangerous drugs comprising the subject matter of all the charges.

[22] The prosecution had therefore proven this ingredient in respect of all the three charges to satisfaction.

[23] The prosecution had also proven the safe custody of the exhibits from the time they were seized until their production in court. I was therefore satisfied that there was no fatal break in the chain of exhibits of the case.

The drugs were in the possession of the accused persons

[24] The prosecution attempted to prove that the house where the impugned drugs were found was owned and occupied by the first accused. To this end the prosecution tendered a copy of a grant to the said house (exh P31) which showed the said house as being registered in the name of the first accused.

[25] Learned counsel for the first accused in his submissions objected to the admissibility of this document being used to prove that the first accused was the owner and occupier as the said document (exh P31) (earlier marked without objection) was a computer generated document which proof was subject to the requirements of s 90A of the Evidence Act 1950, which they submitted was not fulfilled.

[26] It was submitted by learned counsel for the accused that although no objection was raised at the time of its tendering, an inadmissible document remained inadmissible notwithstanding failure of counsel to object to it. The principle cited by learned counsel is beyond dispute. Therefore, I ruled that exh P31 was inadmissible and remained an ID document for want of proof under s 90A of the Evidence Act 1950.

[27] Notwithstanding this however, SP1, who was the neighbour of the first accused confirmed that the first accused had lived in the said house from 2008 onwards. SP5 who is the younger brother of the first accused also confirmed that the first accused is the owner of the said house.

[28] As far as the second accused was concerned, SP5 testified that the second accused was a tenant of the said house albeit for only a day prior to the arrests.

[29] In a charge of trafficking in dangerous drugs, possession is the most important ingredient. Unless there is direct evidence of trafficking, proof of possession is a necessary step towards proving trafficking. The prosecution can prove 'possession' either by direct evidence or employing in aid the presumption under s 37(d) of the DDA.

[30] The law on possession is found in several cases stretching back many years. It is apposite to now consider these cases and extract the principles contained in them so as to apply them to the facts of this case.

[31] In relation to proof of direct possession, the law was taken to be settled as early as 1949 that possession in order to incriminate a person, must have the following characteristics:

(a) the possessor must know the nature of the thing possessed;

(b) he must have a power of disposal over it and;

(c) he must be conscious of his possession of the thing.

[32] See *Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54.

In *Leow Nghee Lim v Reg* [1956] 1 MLJ 28, Taylor J explained 'possession' as

follows:

> The word 'possession' is a vague and general word which cannot be closely defined. *Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge*. This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him. (Emphasis added.)

[33] In *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, Thompson J said:

> ... 'possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed) p 304:
>
> > *A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need*.
>
> *To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out*. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table.
>
> *It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so*, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. *It can only be proved by inference from the surrounding circumstances*.
>
> Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But *there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so*. (Emphasis added.)

[34] In *Public Prosecutor v Muhamad Nasir b Shaharuddin & Anor* [1994] 2 MLJ 576, possession was discussed in the following manner:

Possession is not defined in the DDA. However, it is now firmly established that to constitute possession, it is necessary to establish that; (a) the person had knowledge of the drugs; and (b) that the person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s 37 of the DDA.

[35] In *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 AMR 269, the court after quoting what Thompson J had said in *Chan Pean Leon v Public Prosecutor* held further as follows:

It is trite that what constitutes 'possession' under s 37 of the Act is a question of law (see *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 and *Public Prosecutor v Badrulsham b Baharom* [1988] 2 MLJ 585). It is however a question of fact whether in a given case a person can be said to be in possession of something.

[36] Recently, the submission for the prosecution in cases involving dangerous drugs have advanced the argument that there is no obligation upon them to prove exclusive possession.

[37] The case often cited as authority for that proposition is the case of *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194. The source for this belief is derived from a passage in the case by Abdul Aziz Mohamad FCJ where His Lordship held as follows:

Before proceeding to consider the reasons for the Court of Appeal's decision, *we will say a few words about 'exclusive' possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, — that is, 'exclusive' — that a conviction is possible*. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession ...', we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons'. (Emphasis added.)

[38] A careful reading of the above passage would indicate that what is intended to be conveyed is that possession need not be exclusive to the accused alone and that it can be joint with someone else as well. Notwithstanding what was said in the above passage, the learned judge however goes further to explain in the same case as follows:

The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] MLJ 28:

A ... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. *The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property*.

B Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when C applying presumptions.

Thomson J in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, said that 'possession' for the purposes of criminal law involves possession itself — which some authorities term 'custody' or 'control' — and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* D (9th Ed), at p 304), in which the exclusive element mentioned by Taylor J appears:

> *A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need*.

E Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession. (Emphasis added.)

F **[39]** It is to be noticed from the above passage therefore that what the learned judge had in mind was that it is inappropriate to speak of possession as being exclusive in the sense that possession can only be established by the prosecution if it is proven that only the accused and no one else was in possession. This is apt to convey the wrong impression that possession cannot be jointly held.

G **[40]** There is nothing however in the judgment to convey the view that the element of 'exclusivity' has been done away with. As expressed in the judgment and upon reliance on earlier case law, the element of exclusivity of possession was expressed to be proven when the possessor has the power to exclude other H persons from enjoyment of the property.

[41] The definition of possession itself was expressed to be when a person is so situated with respect to a thing that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that I he may be presumed to intend to do so in case of need. This definition necessarily means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.

[42] At the risk of repetition, it appears that the apprehension of the learned

judge in *Public Prosecutor v Denish a/l Madhavan* with the use of the phrase 'exclusive possession' stems from the tendency it has to mislead one into thinking that possession can only be proven if one person alone had possession as this can convey the wrong impression that possession cannot be joint.

[43] But quite apart from that, the judgment does not do away with the definition of possession as expressed in the older cases referred to, that make it clear that the element of exclusivity in proving possession is important.

[44] The following extract reproduced from the above passage in *Public Prosecutor v Denish a/l Madhavan* will serve to illustrate this:

> Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession.

[45] The reference to the element of exclusive power to deal is meant to convey nothing else than that the power to deal with the proscribed drugs must be exclusive to the possessor or possessors.

[46] I am fortified in expressing my view above by the exhaustive treatment on this subject by En Hisyam Abdullah alias Teh Poh Teik in his book *Drugs Trafficking And The Law*. The learned author has set out to explain with brevity and clarity the elements that go to make up criminal possession and has resorted in that endeavour to draw from principles enunciated from the most recent decisions.

[47] In fact, in the case of *Denish Madhavan* itself, as observed by the learned author, the Federal Court found such exclusivity on the facts of the case itself from the following:

(a) that the accused was the tenant of the premises;

(b) the clear confession by the accused that there were more cannabis under the bed; and

(c) the act of the accused in taking out three bags of cannabis from under the bed.

[48] These factors on the other hand in so far as the trafficking charge is concerned, are noticeably absent in this case. A subsequent decision of the Federal Court adopted a very similar approach to *Denish Madhavan*.

[49] The Federal Court case of *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630, held inter alia, the following:

A So, in our judgment in the circumstances of this case, the presence of the ladies clothing (two female upper garments and two pairs of female jeans) along with male clothing in the third room of the first house does not mean that no possession was established against Siew. *The crucial question is whether Siew was so situated with respect to the proscribed drugs found in the second and third rooms of the first house that* B *he had the power to deal with the drugs as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. In other words, Siew must be so situated that he can deal with the proscribed drugs as if it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he had animus possidendi)*. Invariably this is a fact which can only be proved by inference from surrounding C circumstances of this case. It must be clear from the circumstances in which the proscribed drugs were found, that Siew had the intention of dealing with the drugs as if they belonged to him. The list of such possible circumstances is not exhaustive. One example of such circumstances given by Thompson J in *Chan Pean Leon* is a case where an article is found in a locked room where one holds the key. In the D present case, Siew was in possession of the keys to the locked first house in which large amount of dangerous drugs were found in two locked rooms; the keys to which were kept at the locations known to Siew. (Emphasis added.)

[50] It will be observed from the decision that an important element E considered by the apex court when deciding to fasten possession upon the accused is whether in all the circumstances he had the power to deal with the drugs as owner to the exclusion of all other persons should the need arise. He must also be so situated that he can deal with the drugs as if they belonged to him.

F

[51] A person cannot be said to fulfil the above criteria unless he has the requisite knowledge of the impugned drugs.

[52] On the facts of the case, the Federal Court in *Siew*'s case found these G factors to be present from the following:

(a) the accused had in his possession the keys to the first house;

(b) he was the tenant of the first house; and

H (c) evidence of information leading to discovery under s 27 of the Evidence Act 1950 was admitted by him pointing to sets of keys which led to the discovery of drugs in some of the rooms in the house.

[53] Once again, these factors, with the exception of the charges of I possession in respect to the second accused, are absent from the case under consideration. With regard to the element of exclusivity, the court in *Siew*'s case observed as follows:

> The question is what is the combined effect of all the circumstantial which we have set out? Where did the totality and the total effect of all the evidence lead the court

to? Did it not lead to the inevitable, and the only conclusion that Siew was found in possession of the proscribed drugs? In our judgment the answer to the above question must be in the affirmative. *Siew was so situated with respect to the proscribed drugs found in the second and the third rooms in the first house that he had the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need (Public Prosecutor v Denish Madhavan and Chan Pean Leon v Public Prosecutor applied)*. The learned trial judge was right when he held that the prosecution had proved actual possession of the proscribed drugs against Siew. Having made the affirmative finding of possession, and as the amount of dangerous drugs in this case was more than 15g, the learned trial judge invoked (and in our view rightly) the presumption of trafficking under s 37(da) of the DDA. In our judgment, the learned trial judge was right in calling upon Siew to enter on this defence on the charge of trafficking against him. (Emphasis added.)

[54] It will be noted that the court placed emphasis on the need to deal with the proscribed drugs as owner to the exclusion of all others. It is only logical to deduce that the requirement that the involvement of all other persons are to be excluded can only mean that it must be proven that only the accused or accused persons have exclusive access to the place where the impugned drugs were recovered.

[55] This position was recently emphasised in *Law Sie Hoe v Public Prosecutor* [2014] 6 MLJ 714; [2014] 1 LNS 269. In doing so, the Court of Appeal placed reliance on the case of *Toh Ah Loh & Mark Thim v Rex*.

[56] The need for the prosecution to exclude others to the drugs was also decisive in the case of *Husin bin Sitorus v Public Prosecutor* [2012] 3 MLJ 782; [2012] 7 CLJ 205, as borne out by the following passage:

There is a welter of authoritative precedents which have held that for possession to be established, accessibility by others to the place where the drugs are found should be excluded by evidence by the prosecution (*Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360; [1991] 3 CLJ 2914; [1991] 3 CLJ Rep 557 (HC), *Public Prosecutor v Tang Chew Weng* [1969] 2 MLJ 17; [1969] 1 LNS 141 (HC) might be viewed such as in the present case, implicating the appellant or the other persons who were. *The onus is not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility and the issue must be answered in favour of the appellant if there were more than one way in which the evidence adduced by the prosecution present in the boat* (*Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 (SC)). *In other words exclusivity of custody and control of the drugs ought to be established by the prosecution*. (Emphasis added.)

[57] The position with regard to the need to exclude others from the place where the impugned drugs were found in order for possession to be established could not have been expressed much clearer.

[58] The Court of Appeal case of *Azizan bin Yahaya v Public Prosecutor* [2013] 1 MLJ 180; [2012] 8 CLJ 405, held with respect to the element of exclusivity:

> *We find from the evidence adduced by the prosecution that though the room where the drugs were found was occupied only by the appellant and SP4 but it is pertinent to note that; evidence also showed that the room was accessible to all the other occupants in the house.* SP4 testified that she and the appellant occupied the main bedroom and the children occupied the other two rooms. In cross-examination SP4 agreed that everybody in the house had access to the room (p 28 appeal record). The room was unlocked. Thus whilst the occupants of the room were the appellant and SP4 both of whom would have had complete access to the room, it is also apparent that their three children too had access to the room. Yet SP4 was not charged although she was remanded.
>
> We find that the testimony of SP4 regarding access to the room was hardly challenged. SP5 under cross-examination had also agreed that the appellant's children probably had access to the appellant's room. He was not re-examined on this issue. We agreed with learned counsel that the learned judge had failed to analyse or assess these testimonies. *The prosecution has failed to discharge its bounden duty of excluding access to the appellant's room by others.* (Emphasis added.)

[59] All the above cases drive home the point that the element of exclusivity and the need to exclude others from access to the place where the drugs were found is of paramount importance if the prosecution are to successfully prove custody, control or possession.

[60] Now, applying the principles expressed in the above cases, can it be held on the available evidence that the prosecution had excluded the access of others to the premises so as to successfully establish possession that incriminates?

[61] The facts of the case show that when the acussed persons and SP6 were apprehended, the door and grill to the house was opened by the first accused.

[62] An examination conducted by SP4 in the kitchen area revealed one compressed slab of cannabis wrapped in silver aluminium foil found under the refrigerator. This is the subject matter of the first charge relating to trafficking. It is this charge that will be the subject of the current discussion.

[63] The available evidence clearly showed that the first accused had occupied the said house for a number of years. She also had in her possession the keys to the front door and grill. The evidence also showed that the second accused was also a tenant there, albeit for only one day.

[64] Drawing from the principles enshrined from the cases cited above, the important issue that needs to be addressed is whether under all circumstances,

the prosecution had successfully excluded the access of others to the place where the impugned drugs were found, namely, the kitchen.

[65] The first and common sense observation to make is that the kitchen area, like most kitchen areas, was an open area and had no door separating it from the other parts of the house. Whomsoever therefore who was in the house could access the kitchen area without restriction.

[66] The next piece of evidence that is crucial to the issue of whether others had access to the premises and hence to the kitchen, emanated from the testimony of SP5.

[67] SP5 is the younger brother of the first accused and testified that he was also arrested because he happened to be in the house that day as he had a job posting in Johor Bahru and so he stayed in the house since 19 September 2016 until the date of the arrest.

[68] SP5 said that his sister, the first accused, her two young children and the husband of the first accused by the name of Firdaus stayed in the house. SP5 explained that the first accused was the second wife of Firdaus. Later on, he stated that although Firdaus stays at the house, it was not often.

[69] SP5 said that there are two sets of keys to the house and Firdaus has one set of the keys. SP5 said that Firdaus had purchased the house for the first accused. SP5 also said that during the time he stayed at the house, there was an occasion when the first accused was not at home but was in Kuala Lumpur. SP5 knew about this as he was informed through the Whats App application.

[70] On the day that the first accused was not in the house, SP5 said that when he returned to the house, he found that the gate and the door to the house was opened. SP5 said that he also found that the BMW X6 used by the first accused was not there. SP5 said that he saw a vehicle used by Firdaus there that day.

[71] SP5 then proceeded straight to his room where he said he heard noises as though someone was moving things in the master bedroom, which is the room occupied by the first accused and Firdaus. SP5 said that during the time he stayed at the house, he had seen Firdaus a total of six times in the house, the last of which was on 29 September 2016.

[72] SP8, the investigating officer, testified that his investigations revealed that the first accused lived there with her two children and apart from that there

A was one male tenant ('second accused'), one female ('SP6') and the younger brother of the first accused ('SP5') who had just arrived at the house.

B **[73]** According to SP8 also, a white Hyundai Starex registration No JMX J 77537 registered in the name of Mohd Firdaus Abdullah was found in the premises on the day of the arrests. SP8 however, testified that from his investigation, the name of Mohd Firdaus Abdullah did not arise and neither was he involved in the case.

C **[74]** SP8 further testified that he did record a statement from Mohd Firdaus Abdullah but was unable to produce the statement in court stating that it was in the original investigation papers but not in the one in court before him.

D **[75]** The above testimonies of SP5 and SP8 respectively raises a number of issues, firstly, how is it possible that the investigation of SP8 not reveal the name of Firdaus when SP5 had expressly made mention of Firdaus in his testimony.

E **[76]** If SP5's oral testimony contradicted what he had disclosed in his statement to the police, he would no doubt have been impeached upon penalty of perjury.

F **[77]** As this had not been the case, and although he is the younger brother of the first accused, the evidence of SP5 in respect of the said Firdaus stands to be assessed as credible prosecution evidence just like any other witness for the prosecution.

G **[78]** Secondly, given the fact that SP8 stated that the name of Firdaus did not arise during investigation whereas SP5 had made mention of him, was the investigation by SP8 comprehensive enough?

H **[79]** Thirdly, if SP5 made mention of the fact that Firdaus too had access to the premises and SP8 was of the view that the latter's name never arose during investigations nor was he involved, there therefore exists a clear contradiction between the evidence of SP8 and SP5 in respect of the access of Firdaus to the premises.

I **[80]** Given the fact that the prosecution never called nor offered the said Mohd Firdaus Abdullah as a witness, the question that also arises for determination is whether the prosecution has successfully excluded access of others, notably, the said Firdaus to the premises and also whether the non-calling of Firdaus has resulted in a gap in the prosecution case that consequently also raised the adverse inference under s 114(g) of the Evidence Act 1950.

[81] It has been established that Firdaus is not a figment of imagination on the part of the defence. His existence has been proven by the testimonies of SP5, SP1 and SP8. A

[82] As alluded to earlier, the main piece of evidence that Firdaus also has unrestricted access to the premises came from SP5 as is evident from his testimony. SP5 was categorical that Firdaus has the keys to the premises and therefore unrestricted access to the kitchen area as well. B

[83] It also stands to reason that as there is evidence given that he is the husband of the first accused who is his second wife and that he had purchased the house for her, that he would reasonably have access to the house. SP1 who is a neighbour had also seen Firdaus in the compound of the house. C

[84] The vehicle Hyundai Starex registration No JMX J7537 registered in the name of Mohd Firdaus Abdullah was found in the house on the day of the arrests. The said vehicle was later returned to Firdaus by SP8 at the police station. D

[85] What also seems perplexing is that although a statement was recorded from Firdaus, he was neither called nor offered by the prosecution. The question that begs for an answer is why was Firdaus not called at the very least for the purposes of explaining the true position as to whether he does or does not in fact have access to the premises, whether he has the keys to the premises and to account for his vehicle being present at the premises during the arrest. E F

[86] Firdaus could also at the very least have been called, if for nothing else, but to deny any knowledge of the impugned drugs. All these questions now remain unanswered. It is all very well and good for SP8 to say that according to his investigations, the name of Firdaus did not arise. G

[87] What investigations did SP8 do to arrive at this conclusion? Did he investigate at least what the vehicle belonging to Firdaus was doing at the premises? There appears to be no such evidence forthcoming. So it is no sufficient answer for SP8 to merely state that Firdaus was not involved. H

[88] The inevitable conclusion of this is that the non-investigation and non-calling of Firdaus has resulted in the prosecution failing to exclude access of the kitchen area of others and has also resulted in a gap in the prosecution case. I

[89] The cases cited have shown that implicit in the very definition of 'possession' which is that the acussed had the power to deal with it as owner to

A the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need, is also the need to exclude the accessibility of others to the place where the impugned drugs were discovered. This onus lies unmistakably upon the prosecution.

B **[90]** Even in cases where the prosecution intends to place reliance upon the statutory presumption under s 37(d) of the DDA, by proving custody and control first, it is incumbent for them to exclude accessibility of others to the place where the drugs were found as well as to show knowledge on the part of the accused as to the existence of the thing said to be incriminating.

C

[91] Section 37(d) of the DDA indicates that upon proof of custody or control, possession and knowledge of the nature of the drug is presumed.

D **[92]** The concepts and characteristics of 'custody' and 'control' were explained in the case of *Leow Nghee Lim v Reg* as follows:

> There is no presumption of custody. The presumption is from custody. Unless custody was established, the chain of reasoning is broken. *Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary*
E *implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.*
>
F *... A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it.*
>
> *... Control must be proved as a fact and it must arise from the relation of the person to the goods* ... (Emphasis added.)

G **[93]** The following cases will also show that the requirement to exclude access of others to the place where the drugs are found is also necessary in order to establish custody and control.

[94] In *Public Prosecutor v Kalaiselvan* [2001] 2 MLJ 157; [2001] 4 AMR
H 3973, it was held:

> There is no direct evidence to show that the accused was in possession of the dangerous drugs at the material time. The prosecution must therefore rely on presumptions to make out the charge with which the accused has been charged. *The learned Deputy Public Prosecutor rightly conceded that the presumption contained in*
I *s 37(d) of the Act is inapplicable as the room where the dangerous drugs was found was accessible to others.* (Emphasis added.)

[95] In *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137, the apex court held:

In the instant case the accused denied that he led the police to the discovery of the drugs and that in any event he did not have exclusive possessions of the room where the heroin was found, in that there were at least three others with access to the room, namely, Ah Seng, Ah Fatt and the accused's sister, Phang Sow Ying.

...

In the light of the material contradictions and the circumstances surrounding *we are not satisfied that the prosecution had proved exclusive custody and control of the drugs found in the room*. (Emphasis added.)

[96] In *Saludin bin Surif v Public Prosecutor* [1997] 3 MLJ 317, the Court of Appeal held:

From the evidence of these witnesses, it seems to us that there was no room for doubt that B3 including the cupboard found therein, in which the ganja was found, were not only accessible to all those who resided in the premises but also accessible to anyone who came to the premises. Therefore, it seems clear to us that the prosecution had failed to prove beyond a reasonable doubt that the appellant above had exclusive possession, custody and control of the ganja found in that room. On this score alone, we feel that the learned judge had erred when he invoked the presumption under s 37(d) of the Act against the appellant.

[97] In *Public Prosecutor v Md Alim bin Samad* [1998] 1 MLJ 260, the High Court held:

There was ample evidence to show that all the rooms and the kitchen in the house were accessible to different persons that used to frequent the house. Therefore, even if the accused had knowledge of the presence of the purported cannabis in these places, that by itself would be insufficient to establish possession or control of the cannabis given that others had access to the accused's room (see pp 272F–I and 273A–C); *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 followed. (Emphasis added.)

[98] Finally in *Public Prosecutor v Mohd Zambri bin Mohd Zelah* [2004] MLJU 569; [2005] 2 AMR 23, it was held:

Similarly, on the facts of this case possession of the drugs must be proved in respect of the second charge before the question of trafficking in them can arise for consideration. Thus both charges require proof of possession. There is no direct evidence to show that the accused was in possession of the drugs. It follows that the prosecution has to rely on s 37(d) of the Act to establish possession. *The basic fact that must be proved in order to activate the presumption contained in s 37(d) of the Act is that the accused was in custody of the drugs. As the drugs were found in the accused's room and the bathroom the prosecution must show that the accused had exclusive use of the two rooms (see Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322).

...

Thus the house was accessible to many. In the circumstances; it is not possible to say that the accused had exclusive use of his room and the bathroom in order to rule that he had custody of the drugs found in the two rooms. The corollary is that the prosecution has

A *failed to establish the basic fact necessary to activate the presumption of possession contained in s 37(d) of the Act*. It follows that there is no evidence to show that the accused was in possession of the dangerous drugs with the result that the prosecution had failed to make out a prima facie case on both the charges. (Emphasis added.)

B

[99] The cases above clearly state that in order for custody and control to be proven, it must first be established that others were excluded from access to the place where the impugned drugs were found as well as knowledge on the part of the accused as to the thing said to be incriminatory.

C

[100] The prosecution's failure to prove these basic or primary facts results in them not being able to rely upon the statutory presumption under s 37(d) of the DDA.

D

[101] As far as the first charge is concerned, SP4 initially testified that the reaction of the first and second accused was one of fear 'takut' when the cannabis was recovered. Later on however, SP4 agreed that the reaction of the first accused was normal after the cannabis was discovered. An expression of fear may be, although not all the time, due to guilt. Whether or not the reaction of fear emanates out of guilt depends upon the circumstances.

E

[102] The obvious intention of the prosecution in leading this evidence was to infer knowledge on the part of the accused persons of the impugned drugs. However under the circumstances, even if the first accused displayed any signs of fear, it was only natural for her and the second accused to react in that manner after they were made aware that cannabis had been found.

F

[103] I do not therefore in the circumstances find that such reaction was consistent with them being possessed with knowledge that the impugned drugs were in the place where it was found. At best, such reaction was neutral and capable of more than one inference.

G

[104] As far as the first accused is concerned, SP4 also agreed to the suggestion that she had replied that the police were welcome to search the house as there was nothing incriminating there. This was after she was informed that the police were looking for something incriminating. SP4 also said that when she said this she appeared to be normal.

H

[105] It is also not insignificant that SP4 testified that there was no smell of the cannabis, unlike most situations where such a similar type of drug is found. SP4 also testified that the cannabis was not immediately visible unless one were to bend down, as it was found under the refrigerator.

I

[106] SP4 also said that he did not do any DNA swabbing or fingerprint dusting on the exhibits found. Under all the circumstances it cannot be inferred that the first and second accused had knowledge of the cannabis found under the refrigerator.

[107] The sum total of the above leads to the inevitable conclusion that the prosecution has failed to prove possession, whether actual or presumed, on the part of the first and second accused in respect of the first charge.

Adverse inference under s 114(g) of the Evidence Act 1950

[108] As earlier alluded to, the said Firdaus was not called or offered despite the fact that the fact that his name was mentioned in evidence by SP5. This raises the issue of whether the adverse inference under s 114(g) of the Evidence Act 1950 can be invoked against the prosecution.

[109] In *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, it was held:

> ... it is essential to appreciate the scope of s 114(g) of the Evidence Act 1950 lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but a material document by a party in his possession nor for non-production of just any witness but only an important and material witness to the case.

[110] The prosecution evidence itself tends to establish that the said Firdaus is a material witness.

[111] No doubt, it is the prerogative of the prosecution to call witnesses they deem fit. However, where the said witnesses are essential to the unfolding of the narrative upon which the prosecution case is based, failure to call these witnesses will result in a gap in the prosecution case and result in them failing to prove a prima facie case (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16).

[112] The net result of the failure to call the said Firdaus is that there is a gap in the prosecution case with regard to the issue of excluding his access to the premises and to the kitchen where the cannabis were found.

[113] With these questions being unanswered, the adverse inference under s 114(g) of the Evidence Act 1950 can justifiably be and is invoked against the prosecution.

Several inferences arising

[114] The evidence disclosed admitted of several possible inferences, firstly, that the cannabis was placed under the refrigerator by the first accused, secondly, it was placed there by the second accused, thirdly it was placed there by both the first and second accused and fourthly, it was placed there by Firdaus. It is trite that where these several inferences arise the one favourable to the accused be adopted.

[115] On the facts and under all circumstances therefore, I find that the prosecution has failed to prove possession, whether actual or presumed, on the part of the first accused with regard to the first charge for trafficking and also for the second and third charge for possession.

[116] In respect of the second accused the prosecution has also failed to prove possession in respect of the first charge for trafficking. Without proof of possession, there can be no issue of trafficking as possession is an essential ingredient and the gravamen of the charge of trafficking.

[117] On the facts, there was no evidence of direct trafficking. Having failed to prove possession, the change of trafficking against the first and second accused must necessarily fail. There was therefore no need to go on and consider whether the third ingredient was fulfilled.

Common intention

[118] The essence of the concept of common intention was explained in the Court of Appeal case of *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37, by referring to what was said by Sethi J in the Indian case of *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, as follows:

> Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. *The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence.* Common intention can be formed previously or in the course of occurrence and on a spur of moment. *The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case*. (Emphasis added.)

[119] The above passage can succinctly be summarised as follows:

(a) it is the application of the principle of vicarious liability in criminal law;

(b) it is a rule of evidence;

(c) it is the recognition of the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually;

(d) it pre-supposes prior concert;

(e) this however can not only be formed previously but also during the course of occurrence and on a spur of moment; and

(f) whether there is common intention is a question of fact to be proved mainly by way of inference from circumstances.

[120] The evidence disclosed that while the first accused was occupying the premises for a number of years, the second accused was a tenant for just one day.

[121] Besides this and the fact that they were seen together leaving with SP6 to go out on the day of arrest, there exists no evidence of a prior meeting of minds between them to traffic in the cannabis nor was there any evidence from which such intention can be inferred.

[122] There was therefore no common intention established by the prosecution in respect of the charge of trafficking in the cannabis as per the first charge.

Decision at the end of the case for the prosecution in respect of the first charge

[123] Having carefully sifted through the evidence, I asked myself the all-important question, which is 'were I to call for the defence of the accused persons and they elected to remain silent, would I convict them of the charge?' The answer to the question posed was in the negative.

[124] Upon conducting a maximum evaluation of the evidence, I therefore hold that the prosecution has failed to make out a prima facie case against both the accused in respect of the charge of trafficking under s 39B(1)(a) of the DDA.

[125] In accordance with s 180(2) of the Criminal Procedure Code, I acquit and discharge both the first and second accused on the charge of trafficking without calling upon them to make their defence.

A Decision at the end of the case for the prosecution in respect of the second and third charge

[126] With regard to the second and third charges, the second accused in response to the question by SP4, admitted that there were drugs in the kitchen. He also led the police to the place where the drugs were recovered and handed them over to the police.

[127] This evidence was admissible under s 27 of the Evidence Act 1950 ('the EA') as information leading to discovery. Section 27 of the EA reads:

> 27 How much of information received from accused may be proved
>
> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

In *Sarkar's 'The Law of Evidence'* by LexisNexis, the following commentary on the law relating to s 27 in India provides useful insight as to how the section ought to be applied:

> *Section 27 of the Indian Evidence Act is founded on a principle that even though the evidence relating to the confessional or other statements made by a person while he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered.*

Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence (*Geejaganda Somaiah v State of Karnataka,* 2007 CrLJ 1792; (1797) AIR 2007 (SC) 1355; 2007 AIR SCW 1681; 2007 (3) Crimes 38; 2007 (3) SCC (Cri) 135). As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the section must be viewed with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The Court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of s 27 the Evidence Act (*Geejaganda Somaiah v State of Karnataka,* 2007 CrLJ 1792; (1797) AIR 2007 SC 1355; 2007 AIR SCW 1681; (2007) 3 Crimes 38; (2007) 3 SCC (Cri) 135).

The following are the requirements or condition for application of s 27 of the Evidence Act:

(1) *That consequent to the information given by the accused, it led to the discovery of some fact stated by him.*

(2) *The fact discovered must be one which was not within the knowledge of the police and the knowledge of the fact was for the first time derived from the information given by the accused.*

(3) *Information given by the accused must lead to the discovery of a fact which is the direct outcome of such information.*

(4) *The discovery of the fact must be in relation to a material object and of course would then embrace within its fold the mental condition ie, the knowledge of the accused of the place where the object was produced and the knowledge that it was there.*

(5) *only such portion of the information as is distinctly connected with the said discovery is admissible.*

(6) *The discovery of the fact must relate to the commission of some offence*. (Emphasis added.)

[128] The facts adduced by the prosecution had fulfilled all the elements referred to above. The effect or evidentiary value of such evidence can be seen from the case of *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 which held that:

> ... when it is proved that the accused made a statement to the effect 'I have concealed the articles at a particular place and I will produce them' and if those articles are discovered in consequence of that statement, that would be evidence of his possession even though those articles were kept or concealed in another man's property, because unless he had possession he would not have kept them at that place.

[129] This is as much a matter of common sense more than anything else for how can one say that he kept or concealed articles in a certain place and show where they were unless he has knowledge of them and had been in possession of them?

[130] The second accused therefore had the requisite knowledge of the existence and whereabouts of the methamphetamines and ketamines in the cupboard adjacent to the refrigerator and was therefore in actual possession of them.

[131] Upon a maximum evaluation of the evidence, and for the reasons expressed above, I found that the prosecution had proven a prima facie case against the second accused in respect of the second and third charges relating to possession as preferred pursuant to s 180(3) of the Criminal Procedure Code ('the CPC') and I called upon him to enter on his defence.

[132] The second accused pleaded guilty at that stage to both the second and the third charge. After hearing submissions from parties and taking into account the public interest in deterring such crimes and considering that he was a first offender I sentenced the second accused to three years imprisonment from date of arrest on each charge and ordered them to run concurrently as they were committed in one transaction.

[133] As far as the first accused was concerned, although she was residing in the house, I found no evidence to suggest or infer that she had any knowledge of the incriminating exhibits found in the cupboard nor was there any evidence of any prior meeting of minds with the second accused nor circumstances from which such meeting of minds could be inferred pursuant to a common intention under s 34 of the Penal Code.

[134] As earlier alluded to, the reaction of the first accused if at all, would constitute a normal reaction of someone who had just learned of the discovery of something incriminating thus rendering such conduct neutral at best.

[135] The initial reaction of the first accused in inviting the police to search the place as she said there was nothing incriminating further served to suggest that she had no knowledge of the offending exhibits subsequently handed over by the second accused to the police.

[136] Upon a maximum evaluation of the evidence and for the reasons expressed above, I found that the prosecution has failed to make out a prima facie case against the first accused in respect of the second and third charges.

[137] In accordance with s 180(2) of the Criminal Procedure Code, I acquit and discharge the first accused without calling upon her to make her defence.

Order accordingly.

Reported by Dzulqarnain Ab Fatar